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No. 98-1512

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1998

SANTA MONICA BEACH, LTD.,
Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent,

SANTA MONICA RENT CONTROL BOARD,
Real Party in Interest.

Petition for Writ of Certiorari to the California Supreme Court

BRIEF OF WESTERN MOBILEHOME PARKOWNERS' ASSOCIATION, AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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INTEREST OF AMICUS CURIAE

Amicus curiae Western Mobilehome Parkowners' Association (*"amicus"* or "WMA") is the leading trade association for California's mobilehome and manufactured housing industry. WMA is a nonprofit, tax-exempt organization organized under the laws of California.[1]

[1] This brief is submitted with the written consent of all parties, filed with the Clerk of the Court. It was prepared exclusively by *amicus'* counsel at *amicus'* exclusive expense.

WMA's members include owners and operators of more than eighteen hundred mobilehome and manufactured housing communities throughout California. Rent controls, regulations of land use and constitutional protection of property rights are matters of great interest to WMA members.

Under the Takings Clause of the Fifth Amendment, regulations take private property when they do not substantially advance a legitimate purpose. *Agins v. Tiburon,* 447 U.S. 255 (1980) (*"Agins"*); *Nollan v. California Coastal Commission,* 48 U.S. 825 (1987) (*"Nollan"*). This petitioner alleges that Santa Monica's strict regulation of rents, evictions and conversion of rental property impose substantial costs and burdens upon owners, and operate perversely to defeat their stated purposes. This Court has ruled that the constitutional standards are more than a pleading requirement, and demand more than surmise concerning possible rational bases for legislation. *Nollan,* 483 U.S. 835 n.3 and 841.

Nonetheless, a divided California Supreme Court limited *Nollan* and *Dolan v. City of Tigard,* 512 U.S. 374 (1994) *("Dolan")* to their facts, holding that Santa Monica's rent law deserved greater deference, since the challenged regulations were legislation, rather than permit requirements. Legislation, the California court ruled, should be sustained unless proved arbitrary. Since achievement of some unstated goals could be presumed, the California court denied Santa Monica Beach any opportunity to prove that Santa Monica's law has, in fact, exacerbated the shortage it was supposed to alleviate, and driven away the less fortunate and older residents — while subsidizing favored voters at the property owners' expense.

These are factual issues, capable of proof (or disproof) through expert and other evidence of market activity and the law's effects over nearly 20 years of operation. *Amicus*

believes that under *Nollan, Dolan* and other authoritative interpretations of the Takings Clause, Santa Monica Beach is entitled to its day in court, so that a trial court may decide, after considering all relevant evidence, whether Santa Monica's law does or does not substantially advance a legitimate purpose.

Unless property owners are allowed an opportunity to prove their claims, judicial conjecture about intentions and effects may become a shield for uncompensated, and therefore unconstitutional, appropriations of property; and the "substantial advancement" standard laid down by this Court will be reduced to little more than the theoretical exercise of attempting to divine a rational basis. This Court has "required that the regulation 'substantially advance' the legitimate state interest sought to be achieved . . . not that 'the State *could rationally have decided*' that the measure adopted might achieve the State's objective." 483 U.S. 834 n.3 (emphasis by the Court).

Dissenting and concurring opinions below invite this Court's scrutiny, and together with the petition, identify important issues of first impression, including (i) the application of *Agins, Nollan* and *Dolan* to restrictive legislation, (ii) conflicts between California precedents and this Court's, as well as (iii) precedents in the 9th Circuit and New York.

Rather than revisit these important issues, *amicus* intends to review Santa Monica's rent law in its historical context, compare its operation and effects with *Nollan* and *Dolan,* and explain why regulations restricting property, when challenged under the Takings Clause, deserve the kind of scrutiny that can only come through trial of the merits.

STATEMENT OF THE CASE

Santa Monica Beach claims that Santa Monica's rent control law — renowned by friend and foe alike as one of the nation's most stringent — has appropriated property without compensation, in violation of the Takings Clause.

Rent controls first appeared as emergency measures during this century's two world wars. This Court upheld temporary wartime controls in *Block v. Hirsh,* 256 U.S. 135 (1921) and *Bowles v. Willingham,* 321 U.S. 503 (1944). These emergency measures generally lapsed shortly after the Second World War.

A generation later, persistent inflation inspired permanent, second-generation rent controls in many communities throughout the country. In California, Berkeley led the way with a 1972 initiative amending the city charter to (i) create an elected rent board, (ii) roll rents back to levels in effect a year earlier, (iii) restrict evictions, and (iv) prohibit rent increases, except through formal proceedings for each and every apartment. California's Supreme Court struck down the Berkeley initiative on narrow grounds, because adjustment procedures were too slow and cumbersome, and the eviction provisions conflicted with state law. *Birkenfeld v. City of Berkeley,* 17 Cal. 3d 129, 130 Cal. Rptr. 465, 550 P. 2d 1001 (1976)[2]

Tenant partisans who sponsored the Santa Monica initiative consciously modeled their charter amendment on the 1972 Berkeley initiative. The recitals — notably the stated purpose to benefit the poor, minorities and the aged — are

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[2] In 1980, Berkeley adopted a modified initiative that attempted to correct these deficiencies. Facial attacks were rejected in *Fisher v. City of Berkeley* 37 Cal. 3d 644, 209 Cal. Rptr. 682, 693 P.2d 261 (1984), *aff'd on other grounds,* 475 U.S. 260 (1986).

paraphrased from the Berkeley initiative.[3] Numerous other provisions were also copied from Berkeley's initiative, in light of the *Birkenfeld* opinion.

Santa Monica's 1979 initiative froze rents, rolled rents back to levels in effect during 1978, but thereafter allowed minimal annual increases, as well as individual increases, decided upon applications, after hearing and, if necessary, an appeal to the elected rent control board. Rents remain controlled when tenants move away or are lawfully evicted (though a recent state law now permits adjustments for new tenancies.)[4] Tenants comprise a majority of the electorate. Tenant partisans have dominated the rent board throughout its history. City-wide general rent increases have not kept

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[3] *Compare* Santa Monica Rent Control Charter Amendment §1800:

> *A growing shortage of housing units resulting in a low vacancy rate and rapidly rising rents exploiting this shortage constitute a serious housing problem affecting the lives of a substantial portion of those Santa Monica residents who reside in residential housing.* In addition, speculation in the purchase and sale of existing residential housing units results in further rent increases. These conditions *endanger the public health and welfare of Santa Monica tenants, especially the poor, minorities, students, young families and senior citizens. The purpose of this Article, therefore, is to alleviate the hardship . . . .*

and Section 1 of the 1972 Berkeley charter amendment (reproduced as an appendix to the *Birkenfeld* opinion):

> *A growing shortage of housing units resulting in a critically low vacancy rate, rapidly rising and exorbitant rents exploiting this shortage,* and the continuing deterioration of the existing housing stock *constitute a serious* public emergency *affecting the lives of a substantial proportion of those Berkeley residents who reside in rental housing.* These emergency conditions *endanger the public health and welfare of the City of Berkeley* and *especially the health and welfare of the poor, minorities, students and the aged. The purpose of this Article, therefore, is to alleviate the hardship . . . .")*

(Emphasis added)

[4] Cal. Civ. Code §§1954.50-1954.53.

pace with inflation. Individual increases are generally limited to a fraction of the change in the cost of living. In real terms, adjusted for inflation, Santa Monica rents have declined progressively since 1979.

Santa Monica's charter amendment does much more than control rents. Tenants may petition for rent reductions, recover treble damages and other civil penalties. Violations are criminal offenses. Owners may not evict tenants without just cause. Rental property may not be demolished or converted to any other use without rent board approval.

Twenty years have passed since Santa Monica voters adopted rent control. Since then, the City's supply of rental housing has shrunk. Numbers of families, single parent households, low income tenants, and elderly tenants have, in fact, declined — in contrast to adjacent communities within metropolitan Los Angeles. According to Santa Monica Beach, Santa Monica's stringent rent law accounts for these perverse effects, which are contrary to the measure's stated purposes. Santa Monica Beach therefore claims that Santa Monica's rent law does not, in fact, substantially advance a legitimate purpose, as it must under *Agins, Nollan* and other precedents.

The trial court sustained the rent board's demurrer. On appeal, the California Court of Appeal reversed, agreeing that *Nollan* required "a heightened standard of scrutiny . . . and, if the allegations were true, that the Rent Control Law's failure to meet its stated purposes meant that it failed to substantially advance a legitimate government purpose, and was therefore a taking of property." *Santa Monica Beach v. Superior Court,* 81 Cal. Rptr. 2d 93 at 97 (Cal. 1999). The California Supreme Court reversed, upholding the trial court's dismissal. According to the plurality opinion, "the heightened intermediate scrutiny standard articulated in *Nollan* and *Dolan* does not apply in this case." *Id.* 81 Cal. Rptr. 2d at 102. A concurring opinion endorsed the

plurality's adoption of a "rational relationship" test to determine whether legislative restrictions on property "substantially advance" legitimate purposes, but acknowledged uncertainty concerning application of *Nollan* and *Dolan* to legislation as well as permit proceedings. The concurring opinion "urge[d this Court] to resolve this uncertainty." *Id.* 81 Cal. Rptr. 2d at 112 (Kennard, J., concurring).

SUMMARY OF ARGUMENT

This Court held in *Agins* that application of a land use regulation "effects a taking if the ordinance does not substantially advance legitimate state interests." 447 U.S. at 260. This case of first impression challenges long run application of stringent regulations of rental property under that standard.

Nollan and *Dolan* teach that the Constitution requires an "essential nexus" between exactions from property owners, and the "end advanced as the justification" for the exaction. *Nollan,* 483 U.S. 837. If "a nexus exists" there must be a "rough proportionality" between the means chosen and the desired end. *Dolan,* 512 U.S. at 391. The Court chose this formulation to avoid confusion with "the term 'rational basis' which describes the minimal level of scrutiny under the Equal Protection Clause." *Id.* In other words, the Constitution requires more than the minimal scrutiny exercised by the California court below.

The California court reached a contrary result by limiting *Nollan* and *Dolan* to their facts: dedications of property required as conditions for permits to develop property. *Amicus* believes that *Nollan* and *Dollan* merely illustrate a larger principle: without an adequate nexus between means and ends, regulations of land use, however imposed, cannot substantially advance legitimate interests. These are issues of fact, to be proved or disproved by trial, rather than

decided upon surmise or speculation about rational bases for legislation. This Court has:

> required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved . . . not that "the State '*could rationally have decided*' that the measure adopted might achieve the State's objective."

Nollan, 483 U.S. at 834 n.3 (emphasis by the Court).

Comparison of the facts in *Nollan* and *Dolan* with the claims advanced by Santa Monica Beach confirms that the need for judicial scrutiny is, if anything, even greater when the electorate imposes heavy burdens upon a comparative handful of property owners.

- The burdens upon Santa Monica Beach — restrictions upon rent, eviction and conversion, imposing a kind of statutory leasehold or life estate — are far greater than the easements imposed in *Nollan* and *Dolan.*

- The owners in *Nollan* and *Dolan* received some compensating benefits, through permits to develop their properties, and coherent planning of the surrounding community. Santa Monica Beach receives *no* benefit from Santa Monica's charter amendment.

- Applicants for permits enjoy procedural protections, including hearings and rights of appeal. Planning authorities must base their decisions upon findings and evidence. No such protections exist when voters impose burdens upon other citizens' property through initiative legislation.

Amicus sees no constitutional or practical justification for the California court's deference to Santa Monica's initiative legislation. The same Takings Clause that protects property owners from "extortion" by planners who demand dedications must also protect owners against expropriation through the ballot box.

ARGUMENT

I.

Legislative exactions merit more than minimal scrutiny.

The constitutional system of ordered liberty depends upon a balance between majority rule and respect for the rights of the minority.

> It is of great importance in a republic . . . to guard one part of the society against the injustice of the other part. . . . Justice is the end of government. It is the end of civil society. . . . In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger . . . .[5]

The Takings Clause exists "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960). Our country's founders foresaw judicial independence as a bulwark of liberty, protecting the few against occasional abuses by the many. James Madison wrote, in Federalist No. 78, that:

> [T]he independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance

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[5]The Federalist No. 51 (J. Madison), Wright, ed. pages 357-9 (New York 1996).

in mitigating the severity and confining the operation of such laws.[6]

These principles underlie this Court's insistence upon more than a "minimal level of scrutiny" when citizens claim that exactions from their property advance no legitimate purpose. Indeed, they apply with particular force to initiative legislation granting the bulk of the electorate substantial benefits at the expense of a few property owners. The Takings Clause, after all, is "more than a pleading requirement, and compliance with it [is] more than an exercise in cleverness or imagination." *Nollan,* 483 U.S. 841.

II.

Santa Monica's charter amendment imposes greater burdens upon property than the exactions condemned in *Nollan* and *Dolan.*

Nollan and *Dolan* involved dedication of easements, demanded by planners before they would approve permits to develop property. Mrs. Dolan wished to expand her hardware store. Local planning authorities required her to dedicate strips of property within the floodplain of an adjacent stream, and a pathway for bicycles and pedestrians. The Nollans requested permission to build a home at their seaside property. California's Coastal Commission required the Nollans to dedicate an easement along the beach, connecting two adjacent public beaches.

Neither case involved substantial cost or inconvenience to the property owner. Mrs. Dolan would have had to build a narrow pathway, and tolerate passers-by on foot or bicycle, some of whom might have patronized her business. The Nollans were asked to tolerate beachgoers — who could, in any event, have walked along the beach below the mean

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[6]The Federalist No. 78 (J. Madison), Wright, ed., pages 494-5 (New York 1996).

high tide line (boundary of the Nollans' property) without trespassing. Even minor physical invasions constitute takings of property, *Loretto v. Teleprompter Manhattan CATV Corp.* 458 U.S. 419 (1982), but neither situation imposed significant cost or inconvenience for the property owner.

Moreover, the property owners in *Nollan* and *Dolan* received significant benefits: not only approval for development, but the more general benefits that good planning may confer upon property owners generally. Sound development of coastal zones may protect the environment, enhance property values generally, and provide intangible satisfaction and benefits to visitors and residents alike. Similarly, Mrs. Dolan's hardware store might have benefitted from flood control and good traffic management, thanks to dedicated pathways and floodplains on surrounding property.

The contrasts with Santa Monica are stark.

Santa Monica Beach receives *no* benefits from the rent control charter amendment. Instead, it pays substantial registration fees, suffers strict restrictions on rent, and can neither evict residents nor demolish its building to put the property to some alternative use. In effect, its entire property has been permanently dedicated to rental operation, and the cumulative effect of strict restrictions upon rents, evictions and conversions grants tenants rights roughly equivalent to a kind of statutory leasehold or life estate. These burdens are far more severe, and far more costly, than the easements and dedications in *Nollan* and *Dolan* — and they apply to all owners of rental property, not merely applicants for permits.

Where burdens are so much more severe, the impact widespread, and the benefits to affected owners nonexistent, the need for judicial scrutiny is still greater than in *Nollan* and *Dolan*. Neither the charter amendment nor the tenant partisans consistently elected to the rent board (in a city where tenants dominate the electorate) can be expected to

provide protection from, let alone compensation for, exactions imposed through the ballot box.

III.

Santa Monica's charter amendment provides none of the procedural guarantees available in permit proceedings.

The exactions in *Nollan* and *Dolan* were imposed in permit proceedings. Oregon's land use management program and California's Coastal Act provide elaborate procedural protections, like those found in many planning laws. Applicants submit their applications to planning agencies, which hold hearings and make findings based upon evidence submitted by the applicant, professional planners and other interested parties. Decisions may be appealed, administratively or ultimately, to the courts, challenging the findings, ultimate determination, or any conditions imposed. Often (though not in *Nollan* and *Dolan*) administrative proceedings provide opportunities to reconcile competing interests through negotiation of agreed permit conditions, dedications and the like.

None of these protections exists in Santa Monica, where the burdens upon property owners were imposed by the voters in initiative legislation, from which owners have no appeal. The legislative findings contained in the recitals are not the result of formal rule-making proceedings, or legislative committee reports, after hearings and mature consideration of competing interests. Rather, Santa Monica tenants voted themselves substantial subsidies and other benefits — at the property owners' expense — on the basis of findings paraphrased from another model initiative.

In the circumstances, the need for meaningful judicial scrutiny is, if anything, greater than in permit proceedings. Otherwise, this Court's insistence upon a reasonable nexus between means and ends will — at least in California — be

reduced to a mere pleading requirement, so that substantial advancement of legitimate state purposes may be conclusively established through artful draftsmanship or erudite speculation.

CONCLUSION

Amicus recognizes rent controls and other regulations as facts of life in many communities. However, their application and operation in particular cases remains subject to the Takings Clause. If, as Santa Monica Beach alleges, Santa Monica's charter amendment imposes burdens upon property owners, while subverting its stated purpose, serious questions arise: Does Santa Monica's charter amendment, as applied, substantially advance legitimate state purposes? These questions are matters of fact, to be proved or disproved from evidence, after trial, rather than dismissed based upon judicial conjecture.

For these reasons, *amicus* respectfully requests that this Court grant the petition for *certiorari* filed by Santa Monica Beach.

Dated: April 20, 1999

Respectfully submitted,
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